Appendix

1. Opinion and Judgment of the Court of Appeals.
2. Filing and Spreading Judgment of the Court of Appeals.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 1982, three copies each of the Petition For Writ of Certiorari were mailed, postage paid, to Andrea Sheridan Ordin, United States Attorney, Central District of California and to Sara Criscitelli, Esq., and the Solicitor General of the United States.

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Do Not Publish

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ARTHUR H. BIAGAS, *Defendant,* COTTON BELT INSURANCE COMPANY, INC., *Surety and Real Party in Interest-Appellant.*	No. 81-5210 D.C. No. CR 79-247
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. DAVID DIX, *Defendant,* COTTON BELT INSURANCE COMPANY, INC., *Surety and Real Party in Interest-Appellant.*	No. 81-5211 D.C. No. CR 79-608

MEMORANDUM

Argued and submitted — March 4, 1982
Decided — June 17, 1982

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge, Presiding

Before: ELY and CANBY, Circuit Judges, and EAST,* District Judge.

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Cotton Belt Insurance Co. (Cotton Belt), as surety real party in interest, appeals from an order of the District Court denying its motion to vacate forfeitures of two bail bonds to exonerate it from liability on those bonds. The cases were consolidated in the District Court and on appeal because they present indentical issues. We affirm.

Acting as a surety, Cotton Belt posted bail bonds to secure the release of defendants Biagas and Dix from Government custody. The defendants failed to appear at trial, thereby violating the express provisions of the bail bond contract. The District Court then ordered forfeiture of the bonds, but Cotton Belt was not notified of the forfeitures for 273 days in the Biagas case and 348 days in the Dix case.

Rule 46(e) of the Federal Rules of Criminal Procedure sets forth a statutory procedure for the forfeiture of bail bonds, including provisions for the declaration of a forfeiture upon a breach of the conditions of the bond agreement, the setting aside of a forfeiture in the interest of justice, the entry of a judgment of default when a forfeiture has not been set aside, and, after such a judgment has been entered, the complete or partial remission of it when it appears that justice does not require the enforcement of the forfeiture. Rule 46(f) provides that the court shall exonerate the obligors and release any bail when the conditions of the bond have been satisfied or when a forfeiture has been set aside or remitted. Further, Rule 46(f) provides for the exoneration of a surety either by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

Cotton Belt contends that Rule 46(e) and (f) are, unless supplemented or interpretated in accordance with California or common law, constitutionally infirm. Cotton Belt argues that Rule 46(e) fails to satisfy procedural due process requirements because it does not provide for ade-

quate notice of forfeiture to the surety, and that 46(f) is unconstitutionally vague because it does not specifically indicate when a surety's surrender of a defendant into custody is "timely" for purposes of determining whether the surety may be exonerated.

Any alleged vagueness in the term "timely surrender" is irrelevant in this case, because it is undisputed that Cotton Belt never surrendered either of these defendants into custody. Except in cases involving First Amendment freedoms, challenges to statutes on the grounds of vagueness must be evaluated under the facts of the particular case. *United States v. Powell*, 423 U.S. 87, 92 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *United States v. Louderman*, 576 F.2d 1383, 1388 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978). Rule 46(f) is perfectly clear that, where there is no surrender of the defendant into custody, the surety may not be exonerated on the bond for a "timely" surrender.

In *United States v. Vera-Estrada*, 577 F.2d 598 (9th Cir. 1978), this court squarely held that Rule 46 does not require that a surety may be notified of its principal's failure to appear:

> [R]ule 46(e), Fed. R. Crim. P., establishes the procedures which are to be followed in the federal courts for the enforcement of liability of the surety. Notice is required when the government moves for judgment, but not when the defendant fails to appear and his bond is forfeited. * * * It is the *surety's responsibility to ensure the defendant does appear and learn when he does not.* * * *

Id. at 599-600. (Citations omitted). (Emphasis supplied.)

Cotton Belt attempts to distinguish *Vera-Estrada* on the grounds that the surety in that case argued that a California state statute relating to notice of forfeiture was an

implied term of the bail bond contract. Cotton Belt disclaims any such argument, but offers the same state statute as a "guide to interpretation," insisting that the bail bond contract here must be read against the "background" of either state or common law in order to avoid alleged due process vagueness and notice problems. We disagree. Neither Rule 46 nor the bail bond contract here is vague; they simply do not require that notice of forfeiture be given to the surety. Thus no "guide to interpretation" is required in this case.

Further, notice of forfeiture is not required to satisfy the requirements of due process. By contracting to act as surety, Cotton Belt undertook contractual obligations to insure the presence of its principals at trial. Cotton Belt therefore had a duty to remain apprised of the whereabouts of its principals. *Vera-Estrada,* 577 F.2d at 600; *United States v. Marquez,* 564 F.2d 379, 380 (10th Cir. 1977); *United States v. Payne,* 272 F. Supp. 939, 941 (D. Conn. 1967). Had Cotton Belt fulfilled its contractual duties, it would have had actual notice that its principals failed to appear.

Cotton Belt next contends that the failure of the District Court clerk to promptly notify it of its principals' failure to appear rendered cure of its breach impossible. We disagree. It was Cotton Belt's failure to remain apprised of its principals' whereabouts and to learn of their failure to appear which diminished its ability to cure its breach.

Next, Cotton Belt contends that the bail bond agreements are contracts of adhesion. In particular, it challenges the provision appointing the District Court clerk as the surety's agent for service of process and the provision which states that the surety is "bound" to pay the bond "forthwith," which Cotton Belt interprets as a waiver of its right to contest immediate payment or to receive notice of forfeiture so

that it may make a "timely surrender" of the principal. These arguments are without merit. Cotton Belt freely undertook the obligation to pay its principals' bonds in the event they failed to appear at trial. It cannot now reasonably contend that this obligation was forced upon it by the Government. Further, as noted above, Cotton Belt had no right to notice of forfeiture to waive.

Finally, Cotton Belt contends that equitable principles entitle it to exoneration on the bond. This argument amounts to no more than a recasting of the "impossibility defense" defense argument, and is rejected for the same reasons.

The judgments of the District Court in No. 81-5210 and in No. 81-5211 are each affirmed.

AFFIRMED.

United States District Court
Central District of California
CRIMINAL MINUTES—GENERAL

Case No. CR-79-247-RJK
CR-79-608-RJK

Date: July 16, 1982

Docket Entry:

Present: Hon. Robert J. Kelleher, Judge

James Kimball	N/A	
Deputy Clerk	Court Reporter	Asst. U.S. Attorney

U.S.A. v. (Defendants Listed Below)

(1) Arthur Biagas
___ present ___ custody ___ bond ___ O/R

(2) David Dix
___ present ___ custody ___ bond ___ O/R

(3)
___ present ___ custody ___ bond ___ O/R

(4)
___ present ___ custody ___ bond ___ O/R

Attorneys For Defendants

(1)
___ present ___ appointed ___ retained

(2)
___ present ___ appointed ___ retained

(3)
___ present ___ appointed ___ retained

(4)
___ present ___ appointed ___ retained

Proceedings:

Re: Appeal of Cotton Belt Insurance Company after Bond Forfeiture

THE COURT having received the mandate of the U.S. Court of Appeals, Ninth Circuit, affirming the judgment of the U.S. District Court in forfeiting the bonds in the above-named cases.

IT IS ORDERED that the judgment of the Court of Appeals is hereby filed and spread upon the minutes of this court.

AUSA—Strike Force

William Murphy
68 Mitchell Blvd. #250
San Rafael, CA 94903

Minutes Form 6
Crim—Gen

Initials of Deputy Clerk _____